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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

William P. Hunt, III
Regulatory Counsel
Level 3 Communications, Inc.
1450 Infinite Drive
Louisville, Colorado 80027
(303) 926-3555

Russell M. Blau
Tamar E. Finn
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

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Counsel for Level 3 Communications, Inc.

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SUMMARY

Level 3 Communications, Inc. ("Level 3") will make a unique contribution to meeting the pro-competitive goals of the 1996 Act by seeking to provide to consumers a full range of local, long distance, video, and data services nationwide by means of advanced Internet Protocol ("IP") networks. The Commission should use this proceeding to implement nationally incumbent local exchange carrier ("LEC") unbundling obligations under the Act that will not only address the need for access to UNEs for traditional services, but that will additionally accommodate new technologies and services. Congress, in its first comprehensive amendment to the Communications Act in sixty years, intended for the Act to apply to future advancements in telecommunications. Level 3 submits that the Commission may implement unbundling obligations consistent with both the Act and the guidance provided by the Supreme Court's decision in *AT&T v. Iowa Utilities Board* ("*Iowa Utilities Board*"). This approach will implement the "necessary" and "impair" standards as well as key statutory goals, including the promotion of competition in provision of local telecommunications services and provision of advanced services to all Americans.

Level 3 believes that the Commission possesses broad discretion in crafting rules to implement incumbent LEC network unbundling obligations under the 1996 Act. Level 3 urges the Commission to exercise this discretion, while appropriately defining "necessary" and "impair," by fashioning unbundling obligations in light of the nearly three years experience gained since passage of the 1996 Act. The Commission may, and should, define the "necessary" and "impair" standards so as to achieve the pro-competitive and advanced services goals of the Act.

The Commission should establish a national list of minimum UNEs which all incumbent LECs must make available. The Commission should establish definitions of "necessary" and "impair" based on the extent to which use of alternatives to incumbent LEC network elements would materially and adversely affect the ability of competitive providers to provide service on a cost-effective and high-quality, ubiquitous, and timely basis. The Commission should recognize that few, if any, incumbent LEC network elements are *proprietary*. As the Commission knows, the more stringent "necessary" and "impair" test applies only to proprietary network elements.

Because of the "necessary and impair" standard, the Commission should identify UNEs that would strongly promote the ability of competitive LECs to provide competitive and advanced services. The Commission should designate as UNEs: loops, databases and signaling systems, operations support systems, the network interface device, sub-loop elements, conditioned loops, the "extended link," intra-building wiring, new transport options, and DSLAMs.

The Commission should adjust the national list of minimum UNEs by periodic reviews based on industry comments. Level 3 does not believe that it is possible to know in advance when any network elements should be removed from the list. Accordingly, the Commission should not establish sunset dates.

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Level 3 Communications, Inc. ("Level 3") submits these comments in the above-captioned proceeding[1] initiated by the Commission in response to the Supreme Court's decision in *AT&T v. Iowa Utilities Board* ("*Iowa Utilities Board*")[2] vacating the Commission's initial rules defining what unbundled network elements ("UNEs") incumbent local exchange carriers ("LECs") must make available under Section 251(c)(3) of the Communications Act.[3]

Level 3 is a communications and information services company that is building an advanced Internet Protocol ("IP") technology-based network across the United States and around the world. The Level 3 network will be the first national communications network to use Internet technology end-to-end. Level 3, through its subsidiaries Level 3 Communications, LLC and PKS

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, Second Further Notice of Proposed Rulemaking, DA 99-70 (rel. April 16, 1999) ("*NPRM*").

[2] *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

[3] 47 U.S.C. § 251(c)(3).

Information Services, Inc., will provide a full range of communications services – including local, long distance and data transmission – as well as other enhanced services to its customers.

This proceeding provides the Commission an opportunity under the guidance provided by the Supreme Court to implement the network unbundling obligations of the Act on a national basis. This implementation can be consistent with *Iowa Utilities Board* and additionally promote the growth of competition, promote the development of advanced services and preserve UNE-based entry as a viable mode of market entry.

I. THE COMMISSION SHOULD ESTABLISH A NATIONAL LIST OF MINIMUM UNEs

Level 3 fully supports the Commission's tentative conclusion to establish a "national policy framework" governing access to UNEs and a minimum set of UNEs that all incumbent LECs must offer.[4] A national list of UNEs would provide for a more efficient implementation of the Act, consistent with Congressional intent, by providing for access to a comprehensive array of UNEs without the need for additional proceedings at the state level. A substantial degree of uniformity in access to UNEs would promote competition by removing the need for new entrants to tailor market entry plans to a varying degree of access in different markets. Accordingly, a national minimum list of UNEs would expedite the development of competition.

Level 3 submits that economic or technical conditions do not vary across the country to such an extent that a national minimum list of UNEs could not be established. Many competitive LECs and other market participants have plans for provision of service in many local markets or even on a national basis. The multi-state and even national scope of operations of Bell Operating

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[4] *NPRM* at ¶ 13.

Companies shows a considerable uniformity across these companies' operations. And, for all practical purposes, incumbent LECs use the same technology in provision of service. To the extent separate treatment of some incumbent LECs is warranted based on economic considerations, Section 251(f) of the Act already addresses the possible need for exemptions from unbundling and other obligations applicable to incumbent LECs based on undue economic burdens.[5] Thus, any needs for special economic exemptions can be addressed through that section rather than by refusing to adopt a comprehensive national list of UNEs. To do the latter would undermine the central goal of the Act of speeding local competition.

In addition, *Iowa Utilities Board* does not undermine the ability of the Commission to apply the statutory standards for identification of UNEs or establish a minimum list of UNEs. Moreover, the Supreme Court strongly endorsed the overarching authority of the Commission to establish rules implementing the local competition provisions of the Act.[6] Accordingly, Level 3 submits that the Commission should establish its proposed national list of minimum UNEs.

The Commission should also adopt measures that will ensure that the national minimum list of UNEs is not abrogated by conflicting state decisions. The Commission should provide that States may not limit which network elements should be designated as UNEs for application in their States. Instead, States should be permitted to establish additional UNEs beyond the minimum national list pursuant to federal rules and guidelines, such as the definitions of "necessary" and "impair" that the Commission will establish in this proceeding. These measures

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[5] 47 U.S.C. Section 251(f).

[6] *Iowa Utilities Board*, 119 S.Ct. at 730-31.

will preserve the national minimum list of UNEs while affording states considerable flexibility to address local needs for supplementary UNEs.

II. IDENTIFICATION OF UNEs RESTS LARGELY IN THE COMMISSION'S DISCRETION

The Act does not define "necessary" or "impair." Therefore, the Commission must define these terms for purposes of the local competition provisions of the Act, consistent with the local discretion recognized by the court in *Iowa Utilities Board*. Level 3 submits that if Congress had intended to circumscribe narrowly the Commission's authority in defining terms of access standards, it would have done so.

In *Iowa Utilities Board*, the Court only found that the Commission had not adequately considered whether access to proprietary network element was "necessary" for a competitor to provide service and whether denial of access to network elements would "impair" competition. The Court instructed the Commission to, in deciding which elements to designate as UNEs, apply "some limiting standard, rationally related to the goals of the Act."[7] It directed the Commission to consider "the availability of elements outside the incumbent's network."[8] Thus, in order to meet the Supreme Court's direction, the Commission need only "consider" the availability of network elements from sources independent of the incumbent LEC and may require the incumbent LECs to make network elements available as UNEs, based on their commerical availability from other sources, in a way rationally related to the goals of the Act.

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[7] *Id.* at 734.

[8] *Id.* at 735.

Level 3 submits that the Commission should implement *Iowa Utilities Board* in a manner that will best preserve UNEs as a realistic mode of market entry on a national basis.

III. "NECESSARY" AND "IMPAIR"

A. Timeliness, Cost, Quality, and Ubiquity Should Measure the Availability of Alternatives to Incumbent Network Elements

As noted, the Supreme Court directed the Commission to consider "the availability of elements outside the incumbent's network." Given unlimited time and resources, entire incumbent networks could be duplicated. However, new entrants cannot raise the necessary capital to compete if they cannot demonstrate likely revenues in a near time-frame. Congress intended to introduce competition to the local market nationally as quickly as possible. Therefore, defining "necessary" and "impair" must be done in the context of promoting expeditious entry.

Level 3 submits that timeliness, cost, quality of service, and ubiquity are the criteria that the Commission should use to determine whether, as a practical and economic matter, network elements are available from sources independent of the incumbent LEC. Thus, the Commission should determine that access to a proprietary network element is "necessary," or its non-provision by an incumbent LEC would "impair" the ability of competitive LECs to provide service, based on the extent to which obtaining a network element from sources independent of the incumbent LEC, or self-provisioning, would delay the provision of service, increase the cost of the element to the competitor, or diminish the quality of service it could provide. The Commission should also consider the scope of availability of possible substitutes for network elements obtained from

incumbent LECs, *i.e*, the extent to which elements are available from independent sources with the same ubiquity as incumbent-provided network elements.

Under this approach, the Commission should determine that access to a proprietary network element is "necessary" when there is no substitute available from sources independent of the incumbent LEC that would be comparable in terms of timeliness, price, quality and ubiquity. The Commission should determine that the unavailability of a network element would "impair" a competitor's ability to provide service when there are substitutes available from sources independent of the incumbent but only at a materially: higher cost, lower quality, lesser ubiquity, or in a longer time frame. Thus, if the element is available from sources independent of the incumbent but at materially higher cost, then its unavailability as a UNE would impair a competitor's ability to provide service and it should be designated as a UNE. Thus, if nothing comparable is available, access to the incumbent proprietary element is necessary.

This approach would establish definitions of "necessary" and "impair" that would establish genuine limits on the availability of UNEs. It would therefore comply with the Supreme Court decision. At the same time, it would permit access to all UNEs, without which competitive LECs' ability to provide timely, high-quality, cost-effective and ubiquitous service would be materially and adversely affected.

Level 3 emphasizes that the Commission should keep in mind in assessing the availability of network elements from sources independent of the incumbent that these other sources will never be subject to any obligation to provide them. Thus, only if there is a robust market for a particular element could the Commission conclude that alternative sources were sufficiently available so that lack of a incumbents' network element would not impair a competitor's ability

to provide service. In addition, such a market must provide the same ubiquity as availability of network elements from the incumbent LEC. In this connection, Level 3 does not believe that competitors could provide the same ubiquity because even the oldest and most established facilites-based competitive LECs do not have facilities that extend beyond narrow corridors, even in major markets.

B. Competitive Neutrality Should Also Guide the Definitions of "Necessary" and "Impair"

Section 251(d)(2) provides that the Commission shall consider whether access to proprietary network elements would impair a competitor's ability to provide service that it seeks to offer. Level 3 submits that Congress did not intend that access to UNEs would be sufficient if competitors are only able to provide minimal or non-competitive levels of service. Instead, Congress intended that competitors using UNEs could provide fully competitive levels of service. Accordingly, Level 3 believes that the Commission should define "necessary" and "impair" to produce competitive neutrality between incumbent LECs and UNE-based competitors. Any other approach would thwart the pro-competitive goals of the Act.

C. The "Essential Facilities Doctrine" Does Not Define "Necessary" or "Impair"

The essential facilities doctrine is not appropriate to define "necessary" or "impair." The essential facilities doctrine is a doctrine of antitrust law, originated by the Supreme Court, which has been developed and refined in a myriad of subsequent decisions.[9] The doctrine has been

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[9] *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912); *MCI Communications Corp. v. AT&T,* 708 F.2d 1081, 1132-33 (7th Cir. 1982) (reviewing modern cases).

severely criticized by the leading commentators.[10] Given the fact that a major goal of Congress in the 1996 Act was to reclaim telecommunications policy from an antitrust judge, the Commission should be reluctant to conclude, without more specific legislative direction, that one of its major responsibilities under the Act should be subject to a severely-criticized, largely judge-made doctrine of antitrust law.[11]

In any event, the essential facilities doctrine is fundamentally at odds with one of the basic premises of the 1996 Act -- that there be a variety of entry strategies available for competitors. Thus under the Act some competitors could rely wholly on resale, some on a mix of resale and unbundled elements, and some on their own facilities in combination with unbundled elements or resale, or both.[12] The essential facilities doctrine requires that the facility be "essential to the plaintiff's survival in the market" and "not available from another source or capable of being duplicated by the plaintiff or others."[13] Thus the doctrine is confined to situations in which the *only* feasible competitive entry strategy is to use the "essential" facility. As soon as it is admitted that there is a variety of feasible strategies -- some of which may not require use of the facility -- then the facility is not "essential" and the doctrine does not apply. Accordingly, if the essential facilities doctrine were a measure of the unbundling obligation, unbundling would never be

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[10] *See* IIIA Areeda and Hovenkamp, *Antitrust Law* ¶ 771c (1996) ("Areeda and Hovenkamp") ("Lest there be any doubt, we state our belief that the 'essential facility' doctrine is both harmful and unnecessary and should be abandoned.").

[11] *See* 141 Cong. Rec. S 7889 (June 7, 1995) (Sen. Pressler) (the1996 legislation was intended to "terminate the involvement of the Justice Department and the Federal courts in the making of national telecommunications policy").

[12] *Local Competition Order* at ¶ 12.

[13] Areeda and Hovenkamp, at ¶ 773b.

required where a variety of entry strategies was feasible -- even though Congress assumed competitive entry through unbundled elements would be only one of a variety of entry strategies under the Act.

Another indication of the inapplicability of the essential facilities doctrine is that in the Telecommunications Act of 1996 "many practices in the nature of refusals to deal are simply forbidden," without the case-by-case showing of market power and anti-competitive effects that would otherwise be required by section two of the Sherman Act in the absence of a showing of concerted action.[14] Accordingly, Professors Areeda and Hovenkamp correctly conclude that "the obligations created under the Telecommunications Act itself are significantly broader than those created under Sherman § 2." [15]

Moreover, there is a complete absence of legislative language in the Telecommunications Act of 1996 or legislative history invoking the "essential facilities" doctrine. Section 251(d)(2) itself uses a "necessary" standard for the unbundling of proprietary elements and an "impairment" standard for other elements. As a grammatical matter, the word "necessary" might be read as equivalent to "essential," although the term "necessary" frequently is regarded as a weaker term.[16] But the question would still arise why Congress did not use the term "essential facilities" if it intended to incorporate a specific judicial doctrine carrying that name.

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[14] *Id.* at ¶ 785b, p. 277.

[15] *Id.*

[16] For example, one definition of "essential" is "*absolutely* necessary; indispensable" (emphasis added). *Random House Unabridged Dictionary* 487 (1981).

In addition, the "impairment" standard established by section 251(d)(2)(B) for non-proprietary elements cannot be reconciled, even on a strictly grammatical basis, with the "essential facilities" doctrine. As noted, the essential facilities doctrine requires a showing that the facility is "essential to the plaintiff's survival in the market" and is "not available from another source or capable of being duplicated by the plaintiff or others."[17] By contrast, the dictionary definition of "impair" is "to make, or cause to become, worse; diminish in value, excellence, etc.; weaken or damage." [18] If a facility is "essential to survival in the market" and is "not available from another source or capable of being duplicated," then denial of access does not merely "weaken or damage" a competitor's ability to compete; it *destroys* its ability to compete. Thus a mere showing of "impairment" does not meet the essential facilities doctrine; and to read the "essential facilities" doctrine into the "impairment" standard would be a distortion of the statutory language.

There are other problems with using the "essential facilities" doctrine as an interpretive standard under section 251(d)(2). Under that doctrine, a competitor may be denied access to an "essential facility" if the incumbent has a "legitimate business purpose" for doing so.[19] The existence of a legitimate business purpose must be litigated on a case-by-case basis, and a variety of business purposes have been accepted by the courts as legitimate.[20] Case-by-case litigation of

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[17] Areeda and Hovenkamp at ¶ 773b.

[18] *Random House Unabridged Dictionary* (1981).

[19] *Id.* at ¶ 773e.

[20] *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992) (reservation of transmission capacity for incumbent's own customers); *State of Illinois v. Panhandle Eastern*, 935 F.2d 1469, 1485 (7th Cir. 1991) (legitimate for pipeline to exclude

business purpose would be particularly inappropriate in the telecommunications area. By enacting the 1996 Act, Congress sought to eliminate case-by-case dispositions. There are a variety of ways in which local telephone companies may "hinder competitors who seek necessary local connections," and "[b]ecause of the ease with which much of this behavior might be defended on grounds of 'efficiency,' its prevention on a case-by-case basis might prove especially difficult."[21]

Moreover, the essential facilities doctrine would create an opportunity for the incumbent LECs to litigate on a case-by-case basis the "essentiality" of every element that the Commission -- and Congress -- has assumed would be subject to the unbundling obligation. A taste of what might be expected, if the essential facilities doctrine were adopted as an interpretive guide, may be found in a September, 1995 article by a BellSouth attorney.[22] The article points out that competitive access providers have "duplicated the transport function," that "technology [has begun] to permit feasible duplication of the switching function," and that "[i]n certain geographic areas the local loop may have already lost its 'essential facility' characteristics to some extent, and it is likely to lose these characteristics in many areas of the county in the near future."[23] In

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competitor in order to continue to sell to customers under long-term contracts, for which pipeline had obtained supplies on a take-or-pay basis).

[21] Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 Calif. L. Rev. 1005, 1042 (1987).

[22] Alan L. Silverstein, *Essential Facilities and Refusals to Deal in Network Industries Facing Rapid Technological Change*, Antitrust Report, Sept. 1995, at 3 (MB).

[23] *Id.* at 7.

short, the incumbent LECs could view adoption of the essential facility doctrine as an invitation to challenge every element of the current unbundling obligation.

Level 3 also observes that to the extent the essential facilities doctrine has any role in implementation of Section 251(c), it is clear that only incumbent LECs could be considered to possess any essential facilities. Competitive entrants to the local and interexchange markets do not possess essential facilities.

D. "Proprietary" Should Have Minimal Impact on Access to UNEs

Level 3 believes that it is clear under the Act that "necessary" only applies to "proprietary" network elements. The language of Section 251(d)(2)(A) can only reasonably be interpreted in this fashion. Therefore, in establishing its national list of minimum UNEs the Commission need only apply the "necessary" standard to proprietary network elements.

Further, there is nothing in the statute or its legislative history pointing to any congressional intent that "proprietary" should be given an expansive interpretation. And, there are few network elements that could be considered proprietary under any reasonable definition of that term. By necessity, most network equipment and services are non-proprietary given the need for compatibility and inter-operability of interconnecting networks. Accordingly, the Commission should craft a definition of "proprietary" that appropriately restricts the range of network elements that would be subject to the "necessary" standard. None of the UNEs suggested by Level 3 in these comments are proprietary.

IV. APPLICATION OF THE STATUTORY STANDARDS

A. The Commission Should Take Into Account Differing Business Plans of Competitive LECs

In the NPRM, the Commission asked the extent to which it should take into account differing business plans of competitive service providers in designating UNEs.[24] Level 3 submits that the Commission's national framework governing access to incumbent LEC network elements should include an aggregate of the access needs for the entire competitive LEC industry.

To promote competitive entry across the nation, the Commission should not establish its national list of UNEs based on the experiences and plans of only one segment of the competitive industry. Instead, the competitive goals of the Act are most likely to be met if the Commission adopts a broader focus that accommodates the business plans of a variety of competitive LECs. A minimum list of UNEs based on an incomplete perspective would not produce availability of UNEs that would permit all competitive LECs to participate in meeting the goals of the Act. Accordingly, the Commission should apply its definitions of "necessary" and "impair" to the experience of all competitive LECs. If any substantial record evidence suggests that for some competitive LECs access to a certain network element is necessary, or that its unavailability as a UNE would impair the carrier's ability to provide service, then the Commission should add it to its list of UNEs even if other competitive LECs with different strategies do not need it as a UNE.

B. "Necessary" and "Impair" Can Be Balanced Against Other Factors

Section 251(d)(2) provides that the Commission shall consider "at a minimum" the "necessary" and "impair" standards in determining what UNEs should be available. Level 3

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[24] *See NPRM* at ¶ 27.

submits that this direction clearly provides that the Commission may consider other factors in addition to the "necessary" and "impair" standards. While the Supreme Court made clear that the Commission may not ignore these criteria, there is no reason to believe that the Commission may not consider other factors and balance them against these criteria in determining what network elements must be made available as UNEs. Accordingly, the Commission should conclude that "necessary" and "impair" may be balanced against other factors.

Paramount among these other factors would be the extent to which the availability of a network element as a UNE would help achieve the pro-competitive goals of the Act and would promote the development of advanced services. Level 3 believes that if the unavailability of a network element would make it less likely that the pro-competitive goals of the Act would be achieved, then the Commission can weigh this in deciding whether the element should be a UNE. If designation of the element as a UNE would help promote the development of competition, or would preserve UNE-based market entry, then the Commission may, and should, designate it as a UNE.

V. PROPOSED UNBUNDLED NETWORK ELEMENTS

This proceeding presents an opportunity for the Commission to examine the need for network elements to be designated as UNEs based on its three years of experience in implementation of the 1996 Act. Given that the local telecommunications marketplace is not yet competitive, the Commission should consider whether additional UNEs beyond those identified in the *Local Competition Order* consistent with the "necessary" and "impair" standards could help promote local service competition. Further, the Commission should examine whether, in light of technical developments, including the more realistic possibility of competitive deployment of

some advanced services, designation of additional UNEs could help ensure the speedy roll-out of enhanced telecommunications capability. In addition, the UNEs identified in this proceeding should preserve UNE-provisioned service as a viable mode of market entry.

Level 3 submits that the UNEs discussed below should be designated as UNEs. These UNEs, except for switching to the extent noted below, play a significant role in Level 3's business plan to provide an advanced IP network available to all Americans. They would additionally provide ample opportunities for UNE-based provision of service.[25]

1. Loops.

For all practical purposes, there are no alternatives to use of incumbent LEC loops in provision of competitive local services. While on a theoretical basis with unlimited time and resources parties could duplicate local loops, the requirement that they do so would do more than impair their ability to provide service. It would virtually foreclose meaningful competition in provision of local services. Level 3 fully supports the Commission's "strong expectation" that loops will be subject to the unbundling obligation of Section 252(c)(3).[26] Accordingly, the Commission should redesignate loops as a UNE.

2. Databases and Signaling Systems.

Level 3 submits that use of independent suppliers of database and signaling systems do not provide service at comparable timeliness, cost, quality, or ubiquity as those available from the

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[25] If the Commission determines that it will remove any current UNEs from its national list, it should permanently grandfather any current use of them in order to avoid industry disruptions.

[26] *NPRM* at ¶ 32.

incumbent LEC. In particular, the cost of services from independent vendors greatly exceed incumbent UNE services. Further, as the Commission found in the *Local Competition Order*, alternatives to incumbent LEC signaling systems, such as in-band signaling, would provide a lower quality of service.[27] Nor do independent vendors of these services offer them everywhere. Signaling systems and call-related databases, including LIDB, Toll Free Calling, and AIN databases for the purpose of switch query and database response through the SS7 network, are integral to the provision of contemporary telecommunications services. Accordingly, unavailability of incumbent LEC signaling systems and call-related databases as a UNE would impair competitors' ability to provide service and this should be designated as a UNE.[28] Access to service management systems, which enable competitors to create, modify, or update information in call-related databases, is necessary for competitors to effectively use call-related databases. Accordingly, access to service management systems should also be required as part of this UNE.[29]

3. Operations Support Systems ("OSS").

Operations Support Systems ("OSS") comprise the mechanisms by which competitive LECs obtain pre-ordering, ordering, provisioning, maintenance and repair, and billing functions associated with obtaining UNEs and services from incumbent LECs. Access to OSS is essential to the ability of competitive LECs to provide service. Further, an incumbent LEC is the only

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[27] *Local Competition Order* ¶ 482.

[28] *Id.* at ¶ 491

[29] *Id.* at ¶ 493

source of its own OSS. Accordingly, the Commission must keep OSS on the national list of UNEs. The Commission should require that all incumbent LECs establish an electronic interface to facilitate access to OSS.

4. Network Interface Device

The Network Interface Device ("NID") is the point of interconnection of the telephone network to the customer's inside wiring. Level 3 submits that there is no economic or practical alternative to use of the NID as a UNE that would enable competitive LECs to provide service. As found by the Commission, when a competitor deploys it own loops, the competitor must be able to connect its loops to customers' inside wiring, especially in multi-unit buildings, in order to provide service.[30] Accordingly, the Commission should redesignate the NID as a UNE.

5. Sub-loop Elements.

Loops consist of distribution plant, drops, and electronics. A sub-loop element is merely a portion of the loop such as the drop, a portion of distribution plant such as that between the subscriber's premises and intermediate access points, or loop electronics. In many situations there is no need for access to a sub-loop element because the entire loop is available as a UNE. However, as recognized by the Commission, in some cases the entire loop as configured in a given deployment is unsuitable for provision of some services.[31] Thus, lack of access to digital loop carrier ("DLC") systems in the loop can preclude provision of advanced services by

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[30] *Local Competition Order* at ¶ 392.

[31] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶ 166 (rel. Aug. 7, 1998) ("*Collocation MO&O*").

competitive LECs. In these situations, the service could be provided by means of a sub-loop element to which the competitive LEC can extend its facilities. Sub-loop elements, as with the loop itself, are not realistically available from sources independent of the incumbent LEC. Accordingly, in these situations inability to access the sub-loop element as a UNE would impair competitive LECs' ability to provide service. Level 3 urges the Commission to designate sub-loop elements as UNEs.

The Commission should require incumbent LECs to provide as sub-loop elements: electronic components of the loop, drops, and portions of distribution plant that can be accessed by means of interconnection at remote pedestals, vaults, and outside or underground chambers where loops are currently accessed by incumbent LECs. Moreover, the Commission should require incumbents to make sub-loop elements available throughout their service areas. The Commission should also require incumbent LECs to make available information concerning remote terminals, digital loop carrier systems, and similar aggregation technologies deployed in the incumbent LEC's loop plant. This information is necessary in order for competitive LECs to be able to meaningfully request and use sub-loop elements.

The Commission should also clarify that incumbents must permit interconnection at sub-loop points pursuant to Section 251(c)(2) of the Act "as technically feasible point[s] within the carrier's network."[32]

6. Conditioned Loops.

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[32] 47 U.S.C. § 251(c)(2)(B).

The Commission has recognized that conditioned loops - loops that do not have load coils and bridge taps - are necessary in order for competitive LECs to provide some types of advanced services.[33] Therefore, the unavailability of conditioned loops would impair competitive LECs' ability to provide advanced services. As noted above, the Act does not limit access to UNEs to the provision traditional plain old telephone services. Rather, it specifically refers to telecommunications services. Congress intended by the 1996 Act to create an environment in which all telecommunications services, those known and as yet still unknown, could be provided competitively. Accordingly, the Commission should designate conditioned loops as a UNE. The Commission should additionally reiterate its requirement that incumbent LECs must condition loops on request.[34] This will clarify that incumbent LECs must affirmatively condition loops, not just make them available as UNEs where they are already conditioned. Under these requirements, competitive LECs may obtained conditioned loops as UNEs on request.

7. Extended Link.

Collocation can enable a competitive LEC to make connections between UNEs. Thus, a competitive LEC can use collocation space to connect the loop and transport. This would normally be accomplished by means of a multiplexer. However, competitive LECs are not always able to obtain collocation at each central office where it might be desirable. In some cases, only insufficient collocation space might be available. In other situations, collocation space might be available but it is not economically justifiable because the competitive LEC does

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[33] *Collocation MO&O* at ¶ 53.

[34] *Id.*

not have sufficient customer traffic. In still other situations, a competitive LEC may simply find that collocation as its standard means of interconnection is not feasible under its business plan.

In these situations, where the competitive LEC needs a loop and transport, it will not be able to provide service as a matter of practicality and economics unless it can obtain the loop and transport appropriately connected by means of a multiplexer as one element. This is because the competitive LEC will have no practical way to obtain and connect the loop and transport elements. Accordingly, the Commission should designate the so-called "extended link" comprised of the loop, multiplexer, and transport as a UNE.

The Commission should also specify that the "extended link" must be provided with capabilities to provide services above voice grade capability and must be priced according to the cost-based standard set forth in the 1996 Act. Thus, the "extended link" must be available at DS-1, DS-3 and higher capacities. In these situations the loop, multiplexer, and transport portions must be provided with the electronics capable of these higher speeds, including DLSAMs, where appropriate.

8. Intra-Building Wiring.

Intra-building or inside wiring is essentially the "last one hundred feet" of the loop. Over the last decade the Commission has taken significant steps to increase the ability of customers and competitive providers of services to install new, and reconfigure existing, customer premises wiring.[35] However, the Commission's inside wiring programs were intended to bring competition

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[35] *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Competition of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68-213 of the Commission's Rules filed by the Electronic Industries Association*, CC Docket No. 88-57, Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd

into the equipment market. The inside wiring regulations were devised before Congress acted to bring competition to the local telecommunications market. Accordingly, they do not address situations where it is not practical or economical for competitive LECs to reconfigure or install new customer premises wiring. Thus, in most customer installations, especially in multi-unit dwellings, competitive LECs will not be able to provide service if they must essentially rewire the building in whole or in part in order to provide service. Nor would this make any sense if existing wiring is suitable for provision of services. In addition, premises owners and tenants are not likely to tolerate, or pay for, unnecessary wiring alterations and installations. Instead, competitive LECs must have the ability to access and use customer premises wiring in order to be able to provide service. Accordingly, the Commission should designate customer premises wiring in the competitive services area as a UNE.

The Commission should designate premises and building entrance facilities such as junction and utility boxes, house and riser cable, and horizontal distribution plant as UNEs. This would assure that competitive LECs are able to access the portions of customer premises wiring that are necessary to provide service.

Level 3 acknowledges that only wiring owned by the incumbent may be declared a UNE. However, the Commission should make clear that all wiring owned by the incumbent LEC will be a UNE even if it is on the customer side of the demarcation point. Level 3 stresses that any access by competitive LECs to customer premises wiring as UNEs will be in furtherance of

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4686 (rel. June 14, 1990); *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57, Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 11897 (rel. June 17, 1997).

relationships with customers who have requested service from the competitive LEC. Thus, access to wiring on the customer's side of the demarcation point will be conducted in cooperation with the customer.

The Commission should further provide, however, that there should generally be no charge for access to customer premises wiring as a UNE because in most cases incumbent LECs have already fully depreciated it.[36] Allowing incumbent LECs to charge TELRIC for access to this wiring would permit a windfall recovery since they do not for the most part at this time have negligible costs associated with customer premises wiring.

9. New Transport Options.

As explained, competitive LECs are not able to duplicate even a small percentage of incumbent LECs' ubiquitous transport networks either through self-provisioning or purchase from independent providers. Level 3 urges the Commission in reestablishing interoffice facilities as a UNE to require that a full range of transport options be made available as UNEs. This should include SONET rings and all transport options that are available under tariff. The Commission must also make clear that the transport UNE must be priced at TELRIC. Many incumbent LECs have forced competitive LECs to purchase transport from special access tariffs which include prices that clearly do not comply with the 1996 Act's pricing standards.

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[36] The Commission has previously prohibited incumbent LECs from exercising any ownership rights over simple inside wiring. *Inside Wiring Detariffing Order*, CC Docket 79-105, 51 Fed. Reg. 8498 (1986), ¶¶ 52, 57, *recon. in part, Inside Wiring Reconsideration Order*, 1 FCC Rcd 1190, *further recon.* 3 FCC Rcd 1719 (1988), *remanded NARUC v. FCC*, 880 F.2d 1989. The term "simple inside wiring" refers to telephone wiring installations of up to four access lines. *See* 47 C.F.R. § 68.213.

10. DSLAMs.

Incumbent LECs locate copper loops used to provide DSL service in digital subscriber line access multiplexers ("DSLAMs"). In central offices where collocation space is not available, new entrants will not be able to provide their own DSLAMs. In addition, new technologies will permit carriers to local DSLAMs at remote terminals. If competitors do not have access to subloop elements, they will be placed at a significant competitive disadvantage without the opportunity to place DSLAMs at remote terminals. Alternatively, the DSLAM must be designated a UNE when it is placed at remote terminals. Moreover, DSLAMs are not available from sources independent of incumbent LECs at comparable cost, quality, ubiquity, and timeliness. Accordingly, the unavailability of DSLAMs as a UNE could substantially impair new entrants' ability to provide advanced telecommunications capabilities. DSLAMs should also be designated as UNEs given Congress' intent to promote the deployment of advanced services to all Americans.

11. Local and Tandem Switching.

The Commission observed in the *Local Competition Order* that there are 23,000 central office switches in the U.S. and that it is not realistic to expect that competitors could duplicate even a small percentage of these switches.[37] Nonetheless, of the possible UNEs that the Commission could designate in this proceeding, local and tandem switching are least likely to play a key role in Level 3's business plan to provide a national and international advanced IP network. As a facilities-based carrier, Level 3 plans to meet its needs for local and tandem

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[37] *Local Competition Order* at ¶ 411.

switching through self-provisioning. Level 3 acknowledges that lack of local and tandem switching as UNEs could impair the ability to provide competitive services of carriers that do not emphasize facilities-based provision of services in all markets.

VI. THE COMMISSION SHOULD ESTABLISH PERIODIC REVIEWS OF THE NATIONAL LIST OF UNES

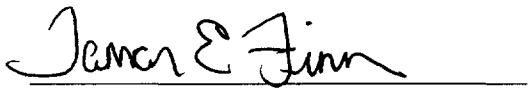
The best way for the Commission to determine in light of changed market or technical conditions whether UNEs should be added to, or removed from, the national list is periodic reviews of the list based on a record gathered from industry comments. This would permit the Commission to update the list under the appropriate statutory standards.

Level 3 does not believe that the Commission could establish preset automatic mechanisms or triggers for removing UNEs. Such sunsets would not entail a substantial risk of harming competition by premature removal of UNEs. The Commission cannot foresee all the circumstances in this proceeding that may warrant continuation of a network element as a UNE .

The Commission should reject the idea of sunset dates for certain UNEs. As discussed, the Commission cannot predict with certainty when competitive LECs will no longer need a network element as a UNE. Moreover, sunset dates would undercut incumbent LEC incentives to comply with unbundling obligations, especially as the sunset date approaches.

VII. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations in these comments.



William P. Hunt, III
Regulatory Counsel
Level 3 Communications, Inc.
1450 Infinite Drive
Louisville, Colorado 80027
(303) 926-3555

Russell M. Blau
Tamar E. Finn
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: May 26, 1999

Counsel for Level 3 Communications, Inc.

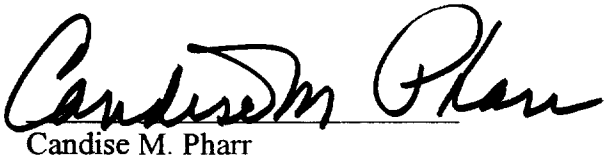
CERTIFICATE OF SERVICE

I, Candise M. Pharr, hereby certify that I have on this 26th day of May, 1999, served copies of the foregoing Comments of Level 3 Communications, Inc. on the following via hand delivery:

Magalie Roman Salas, Esq. (orig. + 12)
Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, DC 20554

Janice Myles (1)
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C327
Washington, DC 20554

ITS (1)
1231 20th Street, N.W.
Washington, DC 20554



Candise M. Pharr